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DECISION AND ORDER

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Superintendent accepted the appeal pursuant to Mont. Code Ann. §20-3-107(1) and Admin. R. Mont. 10.6.121. Richard O. Harkins, the Carter County Attorney, filed the Committee's response to the appeal on February 15, 2002. The District moved the State Superintendent to disqualify County Attorney Harkins as the Committee's attorney on February 20, 2002. The State Superintendent denied the motion to disqualify on April 26, 2002. The State Superintendent heard oral argument and held an evidentiary hearing in this matter on July 10, 2002, in Billings, Montana. The parties' briefing was complete by July 29, 2002.

STANDARD OF REVIEW

This is a review of a county transportation committee decision pursuant to Mont. Code Ann. §20-3-107(1)(b). The State Superintendent applies the standard of review of administrative decisions established by the Montana Legislature in Mont. Code Ann. §2-4-704 and adopted by the State Superintendent in Admin. R. Mont. 10.6.125. The State Superintendent may reverse or modify a county transportation committee's decision if substantial rights of the appellant have been prejudiced because the decision is (a) in violation of constitutional or statutory provisions; (b) in excess of the committee's statutory authority; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (g) affected because findings of fact upon issues essential to the decision were not made although requested. Admin. R. Mont. 10.6.125(4). *Hedges v. The Lake County Transportation Committee*, OSPI 219-33 (1993).

ISSUE

The issue in this case is whether the Committee had the authority to approve the subject student attendance agreements.

FINDINGS OF FACT

1. The Committee met on July 18, 2001. The minutes of that meeting record that the purpose of that meeting was to approve transportation contracts and to "approve tuition for the high school." The Committee considered and approved a motion "to pay all tuition for high school students going to Buffalo, S.D." The Committee also considered and approved a motion "to approve tuition" for students attending Baker and Plevna high schools. A representative of the District's Board of Trustees participated as a member of the Committee at the Committee's July 18, 2001, meeting.

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2. At the July 18, 2001, meeting, the Committee approved student attendance agreements for the following students to attend the Harding County High School in Buffalo, South Dakota: Luke and Cristen Basler (one agreement), Kelley Padden, James Douglas, and Travis Donahey. The Committee also approved a student attendance agreement for Shanna Medearis to attend school in Plevna, Montana. Neither the Harding County High School nor the Plevna School is the resident school districts for these students. There was no evidence presented that the subject students are under the protective care of a state agency, have been adjudicated to be youth in need of intervention or a delinquent youth, or are required to attend a non-resident district as the result of a placement in foster care or a group home.

3. Luke and Cristen Basler reside in Carter County, Montana. During the 2001-2002 school year, Luke was a senior and Cristen was a junior and both attended high school in Buffalo, South Dakota, which is 36.9 miles from their residence in Montana. They live 34.3 miles from the District's Carter County High School ("CCHS"). To attend CCHS, Luke and Cristen would have to travel 10.9 miles of the 34.3 miles on a gravel road.

4. Kelly Padden resides in Carter County, Montana. During the 2001-2002 school year, Kelly was a junior and attended high school in Buffalo, South Dakota, which is 31.5 miles from her residence in Montana. She lives 39.7 miles from CCHS. To attend CCHS, Kelly would have to travel 16.3 miles of the 39.7 miles on a gravel road.

5. James Douglas resides in Carter County, Montana. During the 2001-2002 school year, James was a junior and attended high school in Buffalo, South Dakota, which is 29.3 miles from his residence in Montana. He lives 41.9 miles from CCHS. To attend CCHS, James would have to travel 18.5 miles of the 41.9 miles on a gravel road.

6. Travis Donahey resides in Carter County, Montana. During the 2001-2002 school year, Travis was a junior and attended high school in Buffalo, South Dakota, which is 36.9 miles from his home in Montana. Travis lives 43.9 miles from CCHS. To attend CCHS, Travis would have to travel 18.7 miles of the 43.9 miles on a gravel road.

7. Shanna Medearis resides in Carter County, Montana. During the 2001-2002 school year, Shanna was a junior and attended high school in Plevna, Montana, which is 38.1 miles from her residence. Shanna lives approximately 22 miles from CCHS. To attend CCHS, Shanna

would have to travel 7.6 miles of the 22 miles on a gravel road.

8. The District has provided each of these students with an individual transportation contract.

9. Prior to the 2001-2002 school year, each of these students' parents completed a form agreement entitled "Student Attendance Agreement." The purpose of a Student Attendance Agreement is to allow residents of the District to attend school outside the District. Historically, the District approved all Student Attendance Agreements. Lora Tauck, the District's clerk, testified by affidavit, "attendance and transportation contracts for students residing in Carter County and wishing to attend school in another district have always been approved, more as a matter of formality." She testified further, "Tuition payments were handled by the County Superintendent and paid from state funds."

10. On July 9, 2001, Carole Carey, the Carter County Superintendent of Schools, issued a memorandum titled "In re: County Transportation Meeting." In that memorandum, County Superintendent Carey stated, "The tuition laws have changed dramatically this last legislative session [in 2001]. Tuition can no longer be paid out of County Equalization. The tuition, if paid by the County High School fund will mean extra permissive levies, which means more taxes for all Carter County Taxpayers to pay high school tuition." She went on to write, "The transportation board will determine which tuition is mandatory."

11. The District's Board of Trustees met on July 9, 2001, and considered the 2001 changes in tuition law. The District's Board of Trustees took no specific action concerning the proposed 2001-2002 school year student attendance agreements described above. Instead, the District's Board of Trustees, by motion, directed the District's "trustees on the Transportation Committee to follow law when approving these contracts as mandatory or discretionary."

12. The District's Board of Trustees met on November 12, 2001, and considered the student attendance agreements described above. The minutes of that meeting record:

"[Trustee Noralla Thomas] moved to disapprove the [Shanna] Medearis agreement requesting attendance to Plevna as mandatory. (Transportation is provided thru the Highway 7 bus route, which comes closer to their home than the Plevna bus.) She further moved to disapprove the attendance agreements from Carter County residents requesting to attend school in Buffalo, SD as mandatory ([James] Douglas, [Luke and Cristen] Basler, [Kelly] Padden & [Travis]

Donahey) and to approve them as discretionary. (TR-4, Individual Transportation Contracts are granted for these families in the form of room and board.) [Trustee Jim Keith] seconded the motion and all voted in favor."

13. Following the District's Board of Trustees action on November 12, 2001, Clerk Tauck wrote on each of the Student Attendance Agreement described above "Approved 11/12 as discretionary." Clerk Tauck testified by affidavit that by writing those or similar words on the agreements, she intended to indicate that the Board had approved the agreements as discretionary and not as mandatory. The Chairman of the District's Board of Trustees, Dane Castleberry, executed the agreements on November 16, 2001.

MEMORANDUM OPINION

The Committee lacked the legal authority to approve the subject student attendance agreements as mandatory. Therefore, the Committee erred as a matter of law in approving the subject student attendance agreements.

The query at the center of this appeal is who must pay tuition charged, if any, for the subject students to attend school someplace other than in their resident school districts. Prior to the 2001 Montana Legislative Session, in cases where the attendance was with "mandatory approval," the tuition for a student attending a school outside the student's residence district was financed by the basic county tax for school equalization. In other words, the State of Montana, and not the resident district, was responsible for paying any tuition charged.

Probably because tuition under a mandatory agreement was paid through county funds, county transportation committees often took it upon themselves to review and approve requests for mandatory approval. Transportation committees did this without express statutory or administrative rule authority. As was the case here, the districts would "sign off" on the transportation committee's "approval" as a matter of course. This was apparently the case with the Committee and the District.

However, the Fifty-Seventh Montana Legislature changed that scheme with Senate Bill 65 (2001 Mont. Laws Ch 464), which became effective on July 1, 2002. Under current Montana law,¹ resident school districts are generally responsible for the payment of tuition for an out-of-

¹ The law in effect on July 18, 2001 was Mont. Code Ann. §20-5-321 (2001).

district attendance agreement if the agreement is considered "mandatory" under certain statutory conditions. Those "mandatory" conditions in which the resident district is responsible for paying tuition are:

- The student resides closer to the nonresident school that the student wishes to attend and more than 3 miles from the resident school *and* the resident district does not provide transportation. Mont. Code Ann. §20-5-321(1)(a) (emphasis added). Both conditions -- proximity and no transportation -- must exist for this condition to result in a "mandatory" designation.
- The student resides in a location where, due to geographic conditions between the student's home and the resident school, it is impractical to attend school in the district of residence, as determined by the county transportation committee based on the following criteria:
 - (A) The length of time that is in excess of the 1-hour limit for each bus trip for an elementary child as authorized under 20-10-121;
 - (B) Whether distance traveled is greater than 40 miles one way from the child's home to school on a dirt road or greater than a total of 60 miles one way from the child's home to school in the district of residence over the shortest passable route; or
 - (C) Whether the condition of the road or existence of a geographic barrier, such as a river or mountain pass, causes a hazard that prohibits safe travel between the home and school. Mont. Code Ann. §20-5-321(1)(b)(i).
- The student is under the protective care of a state agency or has been adjudicated to be a youth in need of intervention or a delinquent youth, as defined in 41-5-103. Mont. Code Ann. §20-5-321(1)(d).
- The student is required to attend school outside of the district of residence as the result of a placement in foster care or a group home licensed by the state. Mont. Code Ann. §20-5-321(1)(e).

Under the tuition payment structure designed by the 2001 Legislature, county transportation committees play a specific and limited role. Such committees are charged

with determining "geographic conditions" that would make it "impractical" for the subject student to attend her resident district. Mont. Code Ann. §20-5-321(1)(b)(i). A county transportation committee's determination of impracticality must be made upon three enumerated criteria, outlined in Mont. Code Ann. §20-5-321(1)(b)(i)(A), (B), and (C) and listed above as (A), (B) and (C). Under the revised law, the Committee's authority in this matter was limited to evaluating the attendance agreements to determine whether such geographic conditions existed to make it impractical for the subject students to attend the District's high school. The other variables at play in the revised Mont. Code Ann. §20-5-321 (i.e., those found in Mont. Code Ann. §20-5-321(a), (c), (d), and (e)) do not concern the Committee.

In this case, the Committee erred in designating the subject agreements as mandatory because, applying the criteria discussed above, geographic conditions between the subject students' homes and the District's high school do not make it impractical for the students to attend the District's high school. None of the students are elementary students, thus Mont. Code Ann. §20-5-321(1)(b)(i)(A) does not apply. The distances traveled by the subject students is less than the requisite conditions outlined in (B) above,² thus Mont. Code Ann. §20-5-321(1)(b)(i)(B) does not apply.

However, it appears the Committee considered the condition of the roads, part of the criterion listed as Mont. Code Ann. §20-5-321(1)(b)(i)(C). The minutes of the Committee's July 18, 2001, meeting record: "There was discussion on the students attending Buffalo, S.D. from Carter County. Due to the condition of the gravel roads it is very difficult for these students to attend Carter County High School." However, this conclusion ("very difficult") falls short of the criterion set by law -- "a hazard that

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Student	One Way Mileage to District High School (Must Be Greater than 60 Miles to be Considered Mandatory)	Mileage on Dirt Road (Must Be Greater than 40 Miles to be Considered Mandatory)
Luke & Cristen	34.3	10.9
Kelly	39.7	16.3
James	41.9	18.5
Travis	43.9	18.7
Shanna	22	7.6

prohibits safe travel between the home and school." From the plain language of the operative statute, the Committee would have had to find that some physical barrier or condition of the subject roads would create a hazard or peril that makes safe travel for the students impossible. By definition, "very difficult" does not rise to that level; indeed, "very difficult" implies that travel is possible, although hard. The Committee did not conclude, therefore, that the road's condition creates a hazard that prohibits safe travel. Thus, Mont. Code Ann. §20-5-321(1)(b)(i)(C) does not apply here either.

As guidance to this Committee and other transportation committees considering attendance agreements, the State Superintendent offers the following:

The responsibility of transportation committees relating to attendance agreements, as set forth above, is to "determine" if geographic conditions between the child's home and the school that the child would attend within the district of residence, make it impractical to attend school in the district of residence. That determination is a fact-finding responsibility. As such, it is akin to the fact-finding hearings conducted by transportation committees pursuant to Mont. Code Ann. §20-10-132(1)(d).³

In any event, the determination to be made in this context is the determination of the legal rights, duties or privileges of students and districts. The determination is, therefore, a contested case or school controversy and is governed by the rules of procedure for all school controversies. Those rules of procedure are found at Admin. R. Mont. 10.6.101, et seq. It is this State Superintendent's guidance that when a transportation committee is charged with making a determination pursuant to Mont. Code Ann. §20-5-321, the committee follow those rules of procedure, including, but not limited to, the rules concerning hearings. It is not the objective of this State Superintendent to burden transportation committees, districts, and parents with gratuitous procedure; however, in this context, the transportation committee is determining facts that will affect where a child attends school and who must bear the cost of that child's education. For that reason, specific and formal rules should be followed.

In an effort to avoid further deliberation in this matter, the State Superintendent

³ It is the duty of transportation committees to "conduct hearings to establish the facts of transportation controversies that have been appealed from the decision of the trustees and act on the appeals on the basis of the facts established at the hearing . . ."

notes that none of the other mandatory conditions listed in Mont. Code Ann. §20-5-321 exist in this case. The District provides its students with transportation contracts, thus Mont. Code Ann. §20-5-321(1)(a) does not apply. None of the students are elementary students, thus Mont. Code Ann. §20-5-321(1)(c) does not apply. None of the students are under the protective care of a state agency, have been adjudicated to be youth in need of intervention or a delinquent youth, or are required to attend the non-resident district as the result of a placement in foster care or a group home, thus neither Mont. Code Ann. §20-5-321(1)(d) nor (e) apply.

In sum, because none of the conditions required of an attendance agreement with mandatory approval were met in this case, the District had the authority to approve as discretionary the subject attendance agreements. As discretionary agreements, the District is not bound legally to pay any tuition charged pursuant to the agreements. Mont. Code Ann. §20-5-320.

That said, however, the State Superintendent urges the District to pay any tuition charged under these agreements for the school year 2001-2002 and to hold the parents in this matter harmless. By both parties' admission, the Committee and the District were confused about how to apply the agreement and tuition laws as modified by SB 65. This State Superintendent grants that SB 65 is a confusing piece of legislation that takes time to evaluate and understand. To make this matter worse, SB 65's changes became effective on July 1, 2001, just days before both the District's Board of Trustees and the Committee were scheduled to meet and consider the attendance agreements. It is clear from the evidence in this case that both the District and the Committee thought it reasonable to approve as mandatory the agreements at the Committee's July 18 meeting. The District participated in that meeting and did not object at that time to the mandatory designation. Nonetheless, the Committee was without the authority to approve the agreements, as discussed above.

The parents in this case ought not be penalized for the Committee's and the District's confusion, although the confusion was understandable. The parents presented attendance agreements as they had in previous years. The parents likely had an expectation that the Committee and the District would "sign off" on the agreements and

their children could attend schools as in the past. Indeed, it is reasonable to conclude that the parents allowed their children to start the 2001-2002 school year with the belief that the tuition would be paid for by either Carter County or the District. Because of the appeal process, this decision will not be issued until well after the subject students completed the 2001-2002 school year. However, because of the current status of the law, the State Superintendent must conclude that the District had the legal authority to designate the agreements as discretionary. Nonetheless, to require the parents to pay the tuition charged for the past school year would be unfair. Therefore, the State Superintendent urges the District to pay any tuition charged under these agreements for the school year 2001-2002.⁴

CONCLUSION

The July 18, 2001, decision by the Carter County Transportation Committee to approve certain student attendance agreements as mandatory is REVERSED and the decision of the Board of Trustees of the Ekalaka Public Schools decision to approve certain student attendance agreements as discretionary is AFFIRMED.

Dated this 16th day of August 2002.

/s/
LINDA MCCULLOCH
Superintendent of Public Instruction

⁴The District has available two means of recovering any tuition paid for these students: (1) Mont. Code Ann. §20-5-324 allows for the State to reimburse part of any tuition paid by the District. (2) Montana law allows districts to finance tuition paid from the district's tuition fund (see Mont. Code Ann. §§20-3-324(13), 20-5-324(5) and 20-9-201(1)(a).

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing **DECISION AND ORDER** to be mailed to:

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DATED: August 16, 2002

/s/
Jeffrey A. Weldon